

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KAREN BAUTISTA,

Plaintiff,

vs.

CAROLYN W. COLVIN,

Acting Commissioner of Social Security,
Defendant.

No. 1:15-CV-03064-MKD

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

ECF Nos. 13, 19

BEFORE THE COURT are the parties' cross-motions for summary judgment. ECF Nos. 13, 19. The parties consented to proceed before a magistrate judge. ECF No. 25. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, the Court grants Plaintiff's motion (ECF No. 13) and denies Defendant's motion (ECF No. 19).

JURISDICTION

The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g); 1383(c)(3).

STANDARD OF REVIEW

A district court's review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited; the Commissioner's decision will be disturbed "only if it is not supported by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted). In determining whether the standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. If the evidence in the record "is susceptible to more than one rational interpretation, [the court] must uphold the ALJ's findings if they are supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court "may not reverse an ALJ's decision on account of an error that is harmless." *Id.* An error is harmless "where it is inconsequential to the [ALJ's] ultimate nondisability determination." *Id.* at 1115 (quotation and citation omitted). The party appealing

1 the ALJ's decision generally bears the burden of establishing that it was harmed.
2 *Shineski v. Sanders*, 556 U.S. 396, 409-10 (2009).

3 **FIVE-STEP EVALUATION PROCESS**

4 A claimant must satisfy two conditions to be considered "disabled" within the
5 meaning of the Social Security Act. First, the claimant must be "unable to engage in
6 any substantial gainful activity by reason of any medically determinable physical or
7 mental impairment which can be expected to result in death or which has lasted or
8 can be expected to last for a continuous period of not less than twelve months." 42
9 U.S.C. §§ 423(d)(1)(A); 1382c(a)(3)(A). Second, the claimant's impairment must
10 be "of such severity that he is not only unable to do his previous work[,] but cannot,
11 considering his age, education, and work experience, engage in any other kind of
12 substantial gainful work which exists in the national economy." 42 U.S.C. §§
13 423(d)(2)(A); 1382c(a)(3)(B).

14 The Commissioner has established a five-step sequential analysis to determine
15 whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§ 404.1520(a)(4)(i)-
16 (v); 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant's
17 work activity. 20 C.F.R. §§ 404.1520(a)(4)(i); 416.920(a)(4)(i). If the claimant is
18 engaged in "substantial gainful activity," the Commissioner must find that the
19 claimant is not disabled. 20 C.F.R. §§ 404.1520(b); 416.920(b).

1 If the claimant is not engaged in substantial gainful activity, the analysis
2 proceeds to step two. At this step, the Commissioner considers the severity of the
3 claimant's impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii); 416.920(a)(4)(ii). If the
4 claimant suffers from "any impairment or combination of impairments which
5 significantly limits [his or her] physical or mental ability to do basic work
6 activities," the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c);
7 416.920(c). If the claimant's impairment does not satisfy this severity threshold,
8 however, the Commissioner must find that the claimant is not disabled. 20 C.F.R.
9 §§ 404.1520(c); 416.920(c).

10 At step three, the Commissioner compares the claimant's impairment to
11 severe impairments recognized by the Commissioner to be so severe as to preclude a
12 person from engaging in substantial gainful activity. 20 C.F.R. §§
13 404.1520(a)(4)(iii); 416.920(a)(4)(iii). If the impairment is as severe or more severe
14 than one of the enumerated impairments, the Commissioner must find the claimant
15 disabled and award benefits. 20 C.F.R. §§ 404.1520(d); 416.920(d).

16 If the severity of the claimant's impairment does not meet or exceed the
17 severity of the enumerated impairments, the Commissioner must pause to assess the
18 claimant's "residual functional capacity." Residual functional capacity (RFC),
19 defined generally as the claimant's ability to perform physical and mental work
20 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§

1 404.1545(a)(1); 416.945(a)(1), is relevant to both the fourth and fifth steps of the
2 analysis.

3 At step four, the Commissioner considers whether, in view of the claimant's
4 RFC, the claimant is capable of performing work that he or she has performed in the
5 past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv); 416.920(a)(4)(iv). If
6 the claimant is capable of performing past relevant work, the Commissioner must
7 find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f); 416.920(f). If the
8 claimant is incapable of performing such work, the analysis proceeds to step five.

9 At step five, the Commissioner considers whether, in view of the claimant's
10 RFC, the claimant is capable of performing other work in the national economy. 20
11 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a)(4)(v). In making this determination, the
12 Commissioner must also consider vocational factors such as the claimant's age,
13 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v);
14 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the
15 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
16 404.1520(g)(1); 416.920(g)(1). If the claimant is not capable of adjusting to other
17 work, analysis concludes with a finding that the claimant is disabled and is therefore
18 entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1); 416.920(g)(1).

19 The claimant bears the burden of proof at steps one through four above.
20 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to

1 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
2 capable of performing other work; and (2) such work “exists in significant numbers
3 in the national economy.” 20 C.F.R. §§ 404.1560(c)(2); 416.920(c)(2); *Beltran v.*
4 *Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

5 **ALJ’S FINDINGS**

6 Plaintiff applied for disability insurance benefits on January 2, 2008, and
7 supplemental security income benefits on January 14, 2008. Tr. 131-33, 134-37. In
8 both applications, Plaintiff alleged a disability onset date of July 29, 2007. Tr. 242-
9 50, 252-58. The applications were denied initially, Tr. 74-77, and on
10 reconsideration, Tr. 83-89. Plaintiff appeared at a hearing before an Administrative
11 Law Judge (ALJ) on November 12, 2014. Tr. 567-610. On March 5, 2015, the ALJ
12 denied Plaintiff’s claim.¹ Tr. 510-25.

13 At the outset, the ALJ found that Plaintiff met the insured status requirements
14

15 ¹ A prior hearing was held before a different ALJ on June 10, 2010. Tr. 35-69. On
16 June 24, 2010, the ALJ denied Plaintiff’s applications. Tr. 18-24. In December
17 2013, the District Court granted Plaintiff’s motion for summary judgment, reversed,
18 and remanded for a new hearing and further administrative proceedings. *See* Case
19 No. 2:12-cv-03051-MHW at ECF Nos. 21, 22. The Appeals Council ordered
20 remand for further administrative proceedings. Tr. 656-58.

1 of the Act with respect to her disability insurance benefit claim through December
2 31, 2011. Tr. 513. At step one, the ALJ found that Plaintiff has not engaged in
3 substantial gainful activity since the alleged onset date, July 29, 2007. Tr. 513. At
4 step two, the ALJ found that Plaintiff has the following severe impairments:
5 degenerative disc disease of the cervical and lumbar spine; asthma; bilateral carpal
6 tunnel syndrome (status post bilateral surgical release); headaches; and obesity. Tr.
7 513. At step three, the ALJ found that Plaintiff does not have an impairment or
8 combination of impairments that meets or medically equals a listed impairment. Tr.
9 513. The ALJ then concluded that Plaintiff has the RFC to perform a range of light
10 work, with additional limitations. Tr. 515. At step four, the ALJ found that Plaintiff
11 is able to perform her past relevant work as a cashier and order clerk. Tr. 523.
12 Alternatively, at step five, the ALJ found that, considering Plaintiff's age, education,
13 work experience, and RFC, there are jobs that exist in significant numbers in the
14 national economy that Plaintiff could perform, such as production assembler and
15 hand packager. Tr. 525. On that basis, the ALJ concluded that Plaintiff was not
16 disabled as defined in the Social Security Act. Tr. 525. The Appeals Council denied
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1 review,² making the ALJ's decision the Commissioner's final decision for purposes
2 of judicial review. *See* 42 U.S.C. § 1383(c)(3); 20 C.F.R. §§ 416.1481, 422.210.

3 ISSUES

4 Plaintiff seeks judicial review of the Commissioner's final decision denying
5 her disability income benefits under Title II and supplemental security income
6 benefits under Title XVI of the Social Security Act. ECF No. 13. Plaintiff raises the
7 following issues for this Court's review:

- 8 1. Whether the ALJ properly weighed the medical opinion evidence;
- 9 2. Whether the ALJ properly discredited Plaintiff's symptom claims;
- 10 3. Whether the ALJ properly determined Plaintiff's severe impairments at
11 step two; and
- 12 4. Whether the ALJ properly found that Plaintiff can perform her past
13 relevant work; alternatively, whether the ALJ properly found that there are
14 other jobs that Plaintiff could perform.

15 ECF No. 13 at 7.

18
19 ² This document is not in the Court's record. As neither party raises an issue in this
20 respect, the Court presumes the document was inadvertently omitted.

DISCUSSION

A. Medical Opinion Evidence

Plaintiff faults the ALJ for failing to discuss the opinion of examining psychologist Paul Schneider, Ph.D., and for discrediting the opinions of treatment providers Fady Sabry, M.D., and Nancy Schwartzkopf, ARNP. ECF No. 13 at 18-23.

There are three types of physicians: “(1) those who treat the claimant (treating physicians); (2) those who examine but do not treat the claimant (examining physicians); and (3) those who neither examine nor treat the claimant but who review the claimant’s file (nonexamining or reviewing physicians).” *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (brackets omitted). “Generally, a treating physician’s opinion carries more weight than an examining physician’s, and an examining physician’s opinion carries more weight than a reviewing physician’s.” *Id.* “In addition, the regulations give more weight to opinions that are explained than to those that are not, and to the opinions of specialists concerning matters relating to their specialty over that of nonspecialists.” *Id.* (citations omitted).

If a treating or examining physician’s opinion is uncontradicted, an ALJ may reject it only by offering “clear and convincing reasons that are supported by substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). “However, the ALJ need not accept the opinion of any physician, including a

1 treating physician, if that opinion is brief, conclusory and inadequately supported by
2 clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th
3 Cir. 2009) (internal quotation marks and brackets omitted). “If a treating or
4 examining doctor’s opinion is contradicted by another doctor’s opinion, an ALJ may
5 only reject it by providing specific and legitimate reasons that are supported by
6 substantial evidence.” *Bayliss*, 427 F.3d at 1216 (citing *Lester v. Chater*, 81 F.3d
7 821, 830-31 (9th Cir. 1995)).

8 Here, Dr. Schneider’s opinion is essentially uncontradicted; accordingly, the
9 ALJ was required to provide clear and convincing reasons for discounting it.
10 *Bayliss*, 427 F.3d at 1216. Dr. Sabry’s and Ms. Schwartzkopf’s opinions were
11 contradicted by other treating and examining sources; accordingly, the ALJ was
12 required to provide specific, legitimate reasons supported by substantial evidence to
13 reject Dr. Sabry’s opinion, *Bayliss*, 427 F.3d at 1216, and germane reasons for
14 rejecting Ms. Schwartzkopf’s opinion, *Molina*, 674 F.3d at 1114.

15 *1. Dr. Schneider*

16 Plaintiff alleges that the ALJ failed to discuss an October 2011 opinion, Tr.
17 866-70, by examining psychologist Paul Schneider, Ph.D. ECF No. 13 at 19-20.

18 In October 2011, Dr. Schneider conducted a psychological evaluation and
19 diagnosed Plaintiff with pain disorder associated with both psychological factors and
20 general medical condition; post-traumatic stress disorder (PTSD) in partial

1 remission; and sleep disorder, insomnia, likely due to “schedule and pain issues.”

2 Tr. 869. Dr. Schneider opined that Plaintiff was likely unable to work, but that over
3 time, with behavioral changes, “she may well be able to work someday.” Tr. 869-
4 70.

5 “Where an ALJ does not explicitly reject a medical opinion or set forth
6 specific, legitimate reasons for crediting one medical opinion over another, he errs.”
7 *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014) (citing *Nguyen v. Chater*,
8 100 F.3d 1462, 1464 (9th Cir. 1996)). In other words, an ALJ errs when he rejects a
9 medical opinion or assigns it little weight while doing nothing more than ignoring it,
10 asserting without explanation that another medical opinion is more persuasive, or
11 criticizing it with boilerplate language that fails to offer a substantive basis for his
12 conclusion. *Garrison*, 759 F.3d at 1012-13.

13 Here, the ALJ failed to discuss Dr. Schneider’s opinion, other than to include
14 in her credibility assessment some of the activities Plaintiff described to Dr.
15 Schneider. The ALJ’s sole reference to Dr. Schneider’s opinion simply noted:

16 The claimant reported that she would walk for forty-five minutes several
17 times per week as exercise. She also stated that she was “busy with her
grandchildren three or four times a week.”

18 Tr. 520 (citing Tr. 868) (Dr. Schneider’s evaluation). The ALJ did not otherwise
19 address the evaluation, including Dr. Schneider’s opinion that Plaintiff was “likely”
20 unable to work due to a combination of mental and physical impairments.

1 The Commissioner correctly notes that Plaintiff failed to allege depression or
2 other mental impairments as part of her application. ECF No. 19 at 10. However,
3 there is medical evidence from treating sources referring to mental impairments
4 (depression), including diagnoses and medication treatment, as well as brief
5 testimony from Plaintiff regarding depression. Accordingly, as the only examining
6 psychologist, Dr. Schneider's opinion clearly has some relevance to Plaintiff's
7 possible mental impairments and resulting limitations.

8 For example, Plaintiff's treating sources have specifically discussed treatment
9 for depression. *See, e.g.*, Tr. 863 (in January 2012, treatment provider Mary
10 Murphy, PAC, noted that depakote is helping a little with Plaintiff's depression); Tr.
11 762 (in September 2013, treating source Nancy Schwartzkopf, ARNP, assessed, in
12 part, depressive disorder, NOS; however, Plaintiff declined treatment); Tr. 814-15
13 (in November 2013, Guy Garrett, PAC, listed depression as a chronic problem); Tr.
14 883 (in October 2014, Ms. Schwartzkopf assessed depressive disorder).

15 Moreover, as the only examining psychologist, Dr. Schneider's opinion is
16 uncontradicted. If a treating or examining physician's opinion is uncontradicted, an
17 ALJ may reject it only by offering "clear and convincing reasons that are supported
18 by substantial evidence." *Bayliss*, 427 F.3d at 1216. Here, the ALJ did not give *any*
19 reason for rejecting Dr. Schneider's opinion. Moreover, at step two, the ALJ failed
20 to address whether Plaintiff suffered from any severe mental impairment. Tr. 513.

1 At the hearing, Plaintiff testified that she tries “not to” have a problem with
2 depression. Tr. 599. The ALJ was required to discuss Dr. Schneider’s opinion
3 because, although Plaintiff did not allege mental limitations as part of her
4 application for benefits, Dr. Schneider’s opinion had some support in the medical
5 record by treating sources, is supported minimally by Plaintiff’s own testimony, and,
6 significantly, is not contradicted.

7 For these reasons, the ALJ erred when she failed to discuss Dr. Schneider’s
8 opinion.

9 *2. Dr. Sabry*

10 Next, Plaintiff faults the ALJ for discrediting the opinions of treating
11 physician provider Fady Sabry, M.D. ECF No. 13 at 20-23.

12 In May 2008, Dr. Sabry assessed an RFC for sedentary work due to mild to
13 moderate asthma; Tr. 219, while six months later, he again assessed an RFC for
14 sedentary work, due to moderate asthma and CTS. Tr. 366. Roughly three years
15 later, in January 2011, he assessed an RFC for less than sedentary work, because he
16 opined Plaintiff was unable to lift any amount of weight, occasionally or frequently;
17 Plaintiff could sit and stand for one hour in an eight-hour work day; and no
18 environmental or manipulative restrictions were assessed. Tr. 773-74. Dr. Sabry did
19 not specify the impairments causing the claimant’s limitations, but he opined that
20 pain management and pulmonary consultations were needed. *Id.*

1 The ALJ gave minimal weight to Dr. Sabry's opinions, except to agree with
2 his opinion from 2008 that the claimant's evidence of record is consistent with her
3 ongoing ability to persist with some form of gainful activity after onset. Tr. 521.

4 First, the ALJ rejected these opinions as unsupported by Dr. Sabry's own
5 exam findings. Tr. 521. Contradictions between a doctor's opinion and his own
6 medical results provides a permissible basis to reject his opinion. *See Bayliss*, 427
7 F.3d at 1216. For example, the ALJ found that Dr. Sabry's November 2008 exam
8 revealed normal upper extremities, normal neurological findings, and normal gait
9 and station. Tr. 521 (citing Tr. 364-65); again in January 2011, Dr. Sabry's exam
10 documented normal respiratory findings, normal lumbar spine rotation, and negative
11 single leg raise tests when Plaintiff was seated. The ALJ noted that this exam was
12 otherwise devoid of any testing of Plaintiff's strength, sensation, or mobility. Tr.
13 521 (citing Tr. 773-77). The ALJ notes that in Dr. Sabry's May 2008 opinion, the
14 doctor did not refer to any positive examination findings. Tr. 521 (citing Tr. 418).
15 This was a specific and legitimate reason to reject Dr. Sabry's opinion.

16 Second, the ALJ rejected Dr. Sabry's opinions because they were inconsistent
17 with Plaintiff's work history. Tr. 521. An ALJ may discount an opinion that is
18 inconsistent with a claimant's reported functioning. *See Morgan v. Comm'r of Soc.*
19 *Sec. Admin.*, 169 F.3d 595, 601-02 (9th Cir. 1999). The ALJ found that Plaintiff's
20 ability to work at the medium exertional level with essentially the same limitations

1 assessed by Dr. Sabry, limitations that he opined resulted in an RFC for sedentary
2 work, undermined Dr. Sabry's opinion that Plaintiff was more severely limited. Tr.
3 521. *See* Tr. 164-67 (In September 2014, Plaintiff told provider Ms. Schwartzkopf
4 that she had had back pain for fifteen years, Plaintiff had worked mainly at a
5 medium exertion level until 2007); Tr. 199 (Plaintiff's report of her work history).
6 This was a specific and legitimate reason to reject the medical opinion.

7 Third, the ALJ rejected Dr. Sabry's opinions, finding them inconsistent with
8 the longitudinal treatment records, and by records indicating the assessed conditions
9 have "either improved or been stable with treatment since 2007." Tr. 521. An ALJ
10 may discredit treating physicians' opinions that are conclusory, brief, and
11 unsupported by the records as a whole, or by objective medical findings. *Batson v.*
12 *Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004) (citations
13 omitted). The ALJ relied on other examinations that were inconsistent with an RFC
14 for sedentary work because they were essentially normal. *See* Tr. 521 (citing Tr.
15 335) (At an exam in April 2009, Plaintiff's back, neck, spine and extremities were
16 all normal; no tenderness in Plaintiff's musculoskeletal system is noted); Tr. 517
17 (citing Tr. 304) (in March 2008, Plaintiff displayed clear lungs and normal
18 respiration, asthma deemed stable); (citing Tr. 332) (in April 2009, Dr. Sabry noted
19 respiratory: "Normal to inspection. Lungs clear to auscultation."). Moreover,

1 treatment records showed improvement in asthma with medication,³ in CTS
2 following surgeries,⁴ and lower back pain complaints were inconsistent with normal
3 examination findings, *see, e.g.*, Tr. 335 (essentially normal examination).

4 Because an ALJ need not accept the opinion of any physician, including a
5 treating physician, if that opinion is brief, conclusory, and inadequately supported by
6 clinical findings, *Bray*, 554 F.3d at 1228, and is not required to find an impairment
7 disabling if symptoms can be controlled with medication, *Warre v. Comm’r of Soc.*
8 *Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006) (symptoms effectively controlled
9 with medication are not disabling for purposes of determining eligibility for
10

11 _____
12 ³ See Tr. 245 (asthma improved “a lot” with a change in medication in November
13 2004); Tr. 279 (asthma symptoms worsened when Plaintiff ran out of medication in
14 February 2008); Tr. 406 (in November 2009, Dr. Sabry noted that Plaintiff was
15 “currently stable on three asthma medications.”); Tr. 587 (Plaintiff testified that her
16 asthma improved with medication and treatment).

17 ⁴ See Tr. 394, 387 (Plaintiff underwent right carpal tunnel release on March 1, 2009)
18 and left on May 5, 2009); Tr. 582 (Plaintiff testified that the surgeries helped.). The
19 ALJ further noted that Plaintiff had no treatment for CTS after mid-2009. Tr. 519-
20 20.

1 benefits), the ALJ provided a specific, legitimate reason supported by substantial
2 evidence for discrediting Dr. Sabry's opinions.

3 *3. Nurse Schwartzkopf*

4 Plaintiff contends that the ALJ failed to properly weigh the opinion of Nancy
5 Schwartzkopf, ARNP. ECF No. 13 at 22-23. Specifically, Plaintiff contends that
6 the ALJ ignored the objective basis of these opinions: spinal imaging, pain
7 management treatment records, and Plaintiff's severe obesity. ECF No. 13 at 22
8 (citing Tr. 883).

9 In October 2014, Ms. Schwartzkopf, who had treated Plaintiff from August
10 2012, completed a medical report, opining that Plaintiff was unable to stand or walk,
11 that she was unable to lift even two pounds, and that she would miss work four or
12 more days per month.⁵ Tr. 884-84. Further, Ms. Schwartzkopf opined that these
13 limitations had been ongoing since 2012. Tr. 884-85. The ALJ gave minimal
14 weight to this opinion. Tr. 521.

15 First, the ALJ noted that the assessed limitations were inconsistent with
16 Plaintiff's work history. Tr. 521. An ALJ may discount an opinion that is
17 inconsistent with a claimant's reported functioning. *Morgan*, 169 F.3d at 601-02.

18 ⁵ The ALJ mistakenly cited the limitation as "would miss four or more day[s] per
19 week," Tr. 521, but this is apparently a typographical error.

1 The ALJ pointed out that “the claimant’s longstanding obesity and physical
2 impairments have not prevented gainful employment at a medium exertion level and
3 do not appear to have significantly worsened since her alleged onset date.” Tr. 521.
4 For example, Plaintiff worked at a medium exertion level beginning in either 2004⁶
5 or 2005⁷ until July 2007 as a caregiver, Tr. 164-65; yet in 2014, Plaintiff reported
6 she had experienced back pain for fifteen years, Tr. 804, showing that she worked
7 with the same impairment at a greater exertion level than assessed by Ms.
8 Schwartzkopf. Plaintiff’s work as a hardware laborer, from July 2000 through
9 2002, was also a medium exertion job. Tr. 164-67. Plaintiff testified that she
10 worked at a hardware store as a receptionist, delivery driver, and laborer; she also
11 did some duties related to bookkeeping. Tr. 585-86. This was a germane reason to
12 reject Ms. Schwartzkopf’s opinions.

13 Second, the ALJ noted that the assessed limitations were inconsistent with
14 Plaintiff’s daily activities. Tr. 521-22. An ALJ may discount an opinion that is
15 inconsistent with a claimant’s reported functioning. *Morgan*, 169 F.3d at 601-02. In

16 ⁶ Plaintiff reported she worked as a caregiver from February 3, 2005, until July 29,
17 2007. Tr. 199.

18
19 ⁷ Plaintiff reported she worked as a caregiver beginning in February 2004. Tr. 164-
20 65.

1 support of her finding, the ALJ cited Plaintiff's activities that further undermine Ms.
2 Schwartzkopf's assessed limitations, including Plaintiff's ability to care for an
3 infant, Tr. 578, to serve "as a caretaker for her chronically sick fiancé," Tr. 574-76,
4 and to drive, Tr. 575. Tr. 522. The ALJ reasonably determined that these daily
5 activities were inconsistent with the severe assessed limitations identified by Ms.
6 Schwartzkopf. This was another germane reason for discounting Ms.
7 Schwartzkopf's opinion.

8 Third, the ALJ found that the assessed limitations were inconsistent with the
9 medical record. Tr. 521. An ALJ may discredit treating physicians' opinions that
10 are conclusory, brief, and unsupported by the record as a whole, or by objective
11 findings. *Batson*, 359 F.3d at 1195. The ALJ observed that the December 2010
12 MRI of Plaintiff's lumbar spine revealed mild to moderate degenerative disc disease,
13 with mild to moderate foraminal narrowing and no evidence of central canal
14 stenosis. Tr. 521-22 (citing Tr. 494). Similarly, the ALJ pointed out that in
15 December 2011, cervical spine imaging revealed mild to moderate degenerative
16 changes, with no evidence of instability with flexion or extension. Tr. 522 (citing
17 Tr. 796). The ALJ identified germane reasons for discounting this opinion.

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20 **B. Adverse Credibility Finding**

1 Plaintiff faults the ALJ for failing to provide specific findings with clear and
2 convincing reasons for discrediting her symptom claims. ECF No. 13 at 8-18.

3 An ALJ engages in a two-step analysis to determine whether a claimant's
4 testimony regarding subjective pain or symptoms is credible. "First, the ALJ must
5 determine whether there is objective medical evidence of an underlying impairment
6 which could reasonably be expected to produce the pain or other symptoms alleged."
7 *Molina*, 674 F.3d at 1112 (internal quotation marks omitted). "The claimant is not
8 required to show that her impairment could reasonably be expected to cause the
9 severity of the symptom she has alleged; she need only show that it could reasonably
10 have caused some degree of the symptom." *Vasquez v. Astrue*, 572 F.3d 586, 591
11 (9th Cir. 2009) (internal quotation marks omitted).

12 Second, "[i]f the claimant meets the first test and there is no evidence of
13 malingered, the ALJ can only reject the claimant's testimony about the severity of
14 the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the
15 rejection." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal
16 citations and quotations omitted). "General findings are insufficient; rather, the ALJ
17 must identify what testimony is not credible and what evidence undermines the
18 claimant's complaints." *Id.* (quoting *Lester*, 81 F.3d at 834)); *Thomas v. Barnhart*,
19 278 F.3d 947, 958 (9th Cir. 2002) ("[T]he ALJ must make a credibility
20 determination with findings sufficiently specific to permit the court to conclude that

1 the ALJ did not arbitrarily discredit claimant's testimony."). "The clear and
2 convincing [evidence] standard is the most demanding required in Social Security
3 cases." *Garrison*, 759 F.3d at 1015 (quoting *Moore v. Comm'r of Soc. Sec. Admin.*,
4 278 F.3d 920, 924 (9th Cir. 2002)).

5 In making an adverse credibility determination, the ALJ may consider, *inter*
6 *alia*, (1) the claimant's reputation for truthfulness; (2) inconsistencies in the
7 claimant's testimony or between her testimony and her conduct; (3) the claimant's
8 daily living activities; (4) the claimant's work record; and (5) testimony from
9 physicians or third parties concerning the nature, severity, and effect of the
10 claimant's condition. *Thomas*, 278 F.3d at 958-59.

11 This Court finds the ALJ provided specific, clear, and convincing reasons for
12 finding that Plaintiff's statements concerning the intensity, persistence, and limiting
13 effects of her symptoms were "not credible." Tr. 516.

14 *1. Ability to Work With Impairments*

15 First, the ALJ found that Plaintiff's allegedly disabling impairments have not
16 prevented her from performing medium exertion work in the past. Tr. 516.
17 Working with an impairment supports a conclusion that the impairment is not
18 disabling. *See Drouin v. Sullivan*, 966 F.2d 1255, 1258 (9th Cir. 1992). For
19 example, the ALJ found that for a period between 2000 and 2002, Plaintiff worked
20 at a hardware store, where she stocked, performed clerical and receptionist's duties,

1 and drove deliveries. Tr. 516 (citing Tr. 199). The ALJ further found that between
2 2004 and mid-2007, Plaintiff was again gainfully employed, during which time she
3 worked as a cashier and caregiver. Tr. 516 (citing Tr. 164-65, 199). Her work as a
4 caregiver involved walking and/or standing at least five hours per day (six hours per
5 day as a cashier), and frequently lifting twenty-five pounds. *Id.* Moreover, the ALJ
6 found that when Plaintiff worked a caregiver in July 2006, she told medical
7 providers that she performed this job despite bilateral pain, tingling, and impaired
8 grip in her upper extremities. Tr. 516 (citing Tr. 272).

9 Because an ALJ may properly consider the ability to work despite physical
10 impairments as lessening a claimant's credibility, *see, e.g., Gregory v. Bowen*, 844
11 F.2d 664, 667 (9th Cir. 1988), this was a clear and convincing reason for discounting
12 Plaintiff's credibility.

13 2. Reason Employment Ended

14 Next, the ALJ determined that Plaintiff stopped working for reasons unrelated
15 to her impairments. Tr. 516. An ALJ may consider that a claimant stopped working
16 for reasons unrelated to the allegedly disabling condition in making a credibility
17 determination. *See Tommasetti v. Astrue*, 533 F.3d 1035, 1040 (9th Cir. 2008) (the
18 ALJ properly discounted Plaintiff's credibility based, in part, on the fact that the
19 claimant's reason for stopping work was not related to his disability); *Bruton v.*
20 *Massanari*, 268 F.3d 824, 828 (9th Cir. 2001) (the fact that the claimant left his job

1 because he was laid off, rather than because he was injured, was a clear and
2 convincing reason to find him not credible). The ALJ noted that Plaintiff testified
3 her employment at the hardware store ended because her position was eliminated.
4 Tr. 517 (citing Tr. 585). In addition, Plaintiff's work as a caregiver ended when her
5 father died. Tr. 517 (citing Tr. 583). Similarly, Plaintiff continued to work as a
6 cashier after her father's death; however, this job at a roadside fruit stand ended
7 because it was seasonal. Tr. 517 (citing Tr. 584). The ALJ properly considered and
8 reasonably concluded that Plaintiff's condition was not the reason that she stopped
9 working when assessing her credibility.

10 *3. Impairments Controlled by Medication*

11 The ALJ found that Plaintiff's asthma appeared to be well-controlled with
12 medication. Tr. 516-17. Conditions effectively controlled with medication are not
13 disabling for purposes of determining eligibility for benefits. *Warre*, 439 F.3d at
14 1006. The ALJ noted several instances in the medical record supporting this
15 conclusion. Tr. 516-17 (citing Tr. 245 (asthma was much improved with a change
16 of medication in November 2004); Tr. 279 (Plaintiff's asthma symptoms worsened
17 when she ran out of medication in February 2008); Tr. 406 (in November 2009, Dr.
18 Sabry noted that Plaintiff was currently stable on three asthma medications); Tr. 587
19 (Plaintiff testified that her asthma symptoms improved with medication and
20 treatment)). This was another clear and convincing reason for finding Plaintiff's

1 complaints of severe limitations less than fully credible.

2 *4. Lack of Objective Medical Evidence*

3 The ALJ found that Plaintiff's alleged physical impairments and their
4 corresponding symptoms were not supported by the medical evidence. Tr. 516-20.
5 Subjective testimony cannot be rejected solely because it is not corroborated by
6 objective medical findings, but medical evidence is a relevant factor in determining
7 the severity of a claimant's impairments. *Rollins v. Massanari*, 261 F.3d 853, 857
8 (9th Cir. 2001); *see also Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005).

9 The ALJ noted few objective findings support the level of limitations alleged.
10 Tr. 519. For example, a lumbar MRI in December 2010 revealed only mild to
11 moderate degenerative disk disease, with mild to moderate foraminal narrowing and
12 no evidence of central canal stenosis. Tr. 519 (citing Tr. 493); *see also* Tr. 465
13 (January 2011 exam reveals DTR's are preserved and symmetric). As another
14 example, the ALJ noted that in December 2011, Plaintiff reported that her upper and
15 lower back pain was mild and stable, and that these pain symptoms had been
16 ongoing for ten years. Tr. 519 (citing Tr. 779). On exam, Plaintiff displayed normal
17 mobility in her lumbar and cervical spine; she described mild pain with motion in
18 her cervical spine; and normal range of motion in her shoulders. Plaintiff
19 demonstrated intact balance and gait, no motor weakness, and no sensory loss. Tr.

1 519 (citing Tr. 782). Plaintiff was able “to perform deep knee bend” without
2 problems. Tr. 520 (citing Tr. 783).

3 Because an ALJ may discount pain and symptom testimony based on lack of
4 medical evidence, as long as it is not the sole basis for discounting a claimant’s
5 testimony, the ALJ did not err when she found Plaintiff’s complaints exceeded and
6 were not supported by objective and physical exam findings.

7 *5. Daily Activities*

8 The ALJ found that the level of physical impairment alleged was inconsistent
9 with Plaintiff’s reported daily activities. Tr. 520. A claimant’s reported daily
10 activities can form the basis for an adverse credibility determination if they consist
11 of activities that contradict the claimant’s “other testimony” or if those activities are
12 transferable to a work setting. *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007); *see*
13 *also Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989) (daily activities may be
14 grounds for an adverse credibility finding “if a claimant is able to spend a substantial
15 part of his day engaged in pursuits involving the performance of physical functions
16 that are transferable to a work setting.”). Here, the ALJ found, for example, Plaintiff
17 testified that she was currently serving as a caretaker for her chronically ill fiancé,
18 which entailed helping him dress, preparing his meals, and helping him stand. Tr.
19 520 (citing Tr. 573-75). The ALJ noted Plaintiff also testified that she occasionally
20 cared for a six-month old grandchild and was able to drive, Tr. 575; she regularly

1 played computer games using a keyboard, Tr. 579-80; in 2008, prior to carpal tunnel
2 release surgeries, Plaintiff was able to prepare her own meals, Tr. 582; and
3 Plaintiff's activities in 2008 included beadwork, hiking, and searching for agates and
4 other rocks. Tr. 520 (citing Tr. 581-82). She had taken lengthy road trips, including
5 to Sacramento, California and Vancouver, Washington, after onset. Tr. 520 (citing
6 576-77).

7 "While a claimant need not vegetate in a dark room in order to be eligible for
8 benefits, the ALJ may discredit a claimant's testimony when the claimant reports
9 participation in everyday activities indicating capacities that are transferable to a
10 work setting" or when activities "contradict claims of a totally debilitating
11 impairment." *Molina*, 674 F.3d at 1112-13 (internal quotation marks and citations
12 omitted). The record supports the ALJ's determination that the range of both
13 physical and mental activities that Plaintiff reported are inconsistent with allegedly
14 disabling limitations and demonstrate an ability to perform work-like activities. The
15 ALJ properly relied on daily activities that exceeded alleged limitations when she
16 assessed Plaintiff's credibility.

17 In sum, despite Plaintiff's arguments to the contrary, the ALJ provided
18 specific, clear, and convincing reasons, supported by the record, for rejecting
19 Plaintiff's testimony. *See Ghanim*, 763 F.3d at 1163.

C. Step Two

Plaintiff contends that the ALJ erred at step two by failing to include several severe impairments. EFC No. 13 at 23-24. Specifically, Plaintiff contends the ALJ should have included fibromyalgia/pain disorder and “multiple severe mental impairments.” ECF No. 13 at 26.

Given the Court’s prior findings regarding the medical opinion evidence, on remand, the ALJ should reevaluate the step two findings. The ALJ should assess whether the diagnosed conditions of fibromyalgia, pain disorder, and depression constitute severe impairments, and determine whether any impairments or any combination of impairments result in additional limitations or render Plaintiff unable to perform work. A medical and psychological expert may be helpful in assisting the ALJ on remand.

D. Steps Four and Five

Upon remand, the ALJ will need to perform a new step four and possibly step five analysis after considering Dr. Schneider’s opinion and the evidence of other impairments at step two, as discussed *supra*.

E. Remedy

This Court finds that the ALJ erred by failing to address the uncontradicted opinion of examining psychologist Dr. Schneider, the only source who evaluated Plaintiff specifically for mental limitations. The question remains whether the ALJ’s

1 error was harmless.

2 Based upon Plaintiff's RFC, which included no mental limitations, and the
3 vocational expert's testimony, the ALJ found Plaintiff able to perform her past
4 relevant work as a cashier and order clerk. Tr. 523. Consequently, the ALJ found
5 Plaintiff was not disabled within the meaning of the Social Security Act. Tr. 524.
6 *See* 20 C.F.R. §§ 404.1560(b)(3) ("If we find that you can still do your past relevant
7 work, we will determine that you can still do your past work and are not disabled."),
8 416.960(b)(3)(same).

9 A reviewing court cannot consider an error harmless unless it can confidently
10 conclude that no reasonable ALJ, when fully crediting the testimony, could have
11 reached a different disability determination. *See Stout v. Comm'r of Soc. Sec.*
12 *Admin.*, 454 F.3d 1050, 1056 (9th Cir. 2006). This Court cannot so conclude. For
13 example, if fully credited, Dr. Schneider's opinion could potentially support a
14 conclusion that Plaintiff is unable to work. Consequently, the ALJ's error in failing
15 to provide reasons for rejecting it was not harmless.

16 Administrative proceedings are useful where there is a need to resolve
17 conflicts and ambiguities in the evidence. *Treichler v. Comm'r of Soc. Sec. Admin.*,
18 775 F.3d 1090, 1101 (9th Cir. 2014) (citing *Andrews v. Shalala*, 53 F.3d 1035, 1039
19 (9th Cir. 1995)). Here, there are conflicts to resolve. In determining the RFC, the
20 ALJ is required to consider the combined effect of all the claimant's impairments,

1 mental and physical, exertional and non-exertional, severe and non-severe. 42
2 U.S.C. § 423(d)(2)(B), (5)(B). Here, this Court finds that upon remand, the ALJ
3 must consider Plaintiff's mental impairments and any resulting limitations. For
4 example, the ALJ did not consider mental impairments when she assessed
5 credibility. *See* Tr. 513-20. If the ALJ determines on remand that Plaintiff suffers
6 mental impairments with resulting limitations, vocational testimony may be required
7 to determine whether mental limitations erode the occupational base of jobs Plaintiff
8 is potentially able to perform.

9 "Where," as here, "there is conflicting evidence, and not all essential factual
10 issues have been resolved, a remand for an award of benefits is inappropriate."
11 *Treichler*, 775 F.3d at 1101. Instead, this Court remands this case for further
12 proceedings.

13 CONCLUSION

14 The ALJ's decision is not supported by substantial evidence or free of legal
15 error. On remand, the ALJ should conduct a new hearing and (1) consider at step
16 two the evidence of mental impairments and proceed if necessary with the sequential
17 evaluation; (2) take the testimony of medical and psychological experts, if
18 necessary, to determine Plaintiff's RFC; and (3) take the testimony of a vocational
19 expert, if necessary, to determine whether Plaintiff is able to work and if there are
20 past or other jobs that Plaintiff is able to perform.

IT IS ORDERED:

1. Plaintiff's Motion for Summary Judgment (ECF No. 13) is **GRANTED** and the matter is remanded to the Commissioner for additional proceedings pursuant to sentence four. 42 U.S.C. § 405(g).

2. Defendant's Motion for Summary Judgment (ECF No. 19) is **DENIED**.

3. An application for attorney's fees may be filed by separate motion.

The District Court Executive is directed to file this Order, enter **JUDGMENT FOR THE PLAINTIFF, REMAND THE CASE FOR FURTHER PROCEEDINGS**, provide copies to counsel, and **CLOSE** the file.

DATED this 28th day of September, 2016.

S/Mary K. Dimke
MARY K. DIMKE
UNITED STATES MAGISTRATE JUDGE